

No. 83-228

Office-Supreme Court, U.S.

FILED

OCT 11 1983

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In the Supreme Court of the United States

OCTOBER TERM, 1983

S & VEE CARTAGE COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that 18 U.S.C. 1027, which prohibits the making of false statements on reporting forms submitted to employee pension and welfare benefit funds, is not limited to activities of fiduciaries of a pension fund, but also applies to the conduct of employers who submit reports to the funds.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner S & Vee Cartage Company was convicted on eight counts of making false statements in records submitted to employee welfare and pension benefit funds, in violation of 18 U.S.C. 1027, one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371 and 1027, and one count of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Silverio Vitello was convicted on one count of making a false statement in a

report submitted to an employee pension benefit fund, one count of conspiring to commit that offense, and one count of mail fraud. Petitioner Anna Vitello was convicted on two counts of making false statements in reports submitted to an employee pension benefit fund, one count of conspiring to commit those offenses, and one count of mail fraud.¹ S & Vee was fined a total of \$25,000; Silverio Vitello was sentenced to two years' imprisonment and was fined \$10,000; and Anna Vitello was sentenced to two years' imprisonment and fined \$11,000. The court of appeals affirmed (Pet. App. C1-C14).

1. The evidence, as reflected in the opinion of the court of appeals, showed that petitioners Silverio and Anna Vitello were the sole officers and directors of petitioner S & Vee Cartage Company, a steel-hauling company that does business in Detroit and Warren, Michigan. In 1973 and 1977, the corporation entered into collective bargaining agreements with Locals 299 and 124 of the Teamsters Union, respectively. Under the agreements' provisions, the corporation was required to make contributions to the union's pension and welfare funds for each regular employee. The pension fund automatically billed petitioners for contributions for all eligible employees. In order to delete or add any employee, petitioners had to submit an employee billing changes and corrections ("EBCC") form to the pension fund. Petitioners also approved monthly reports that were sent to the welfare fund (Pet. App. C2).

In March 1979, pension fund auditors reviewed petitioners' books and determined that six of petitioners' employees, who had been excluded from the reports, should

¹S & Vee was acquitted on 12 false statement counts and one mail fraud count; Silverio Vitello was acquitted on 19 false statement counts and one mail fraud count; Anna Vitello was acquitted on 18 false statement counts and one mail fraud count.

have been enrolled in the pension fund (Pet. App. C3). Despite this audit, petitioners still submitted a false EBCC form to the pension fund in August 1979 (*ibid.*). That form alleged that six employees had been terminated in April and May 1979, but in reality three of those employees were still working for petitioners at the time the form was submitted, and those employees in fact worked for the remainder of the year (Pet. App. C3). Similarly, in 1979 petitioners sent six false forms to the welfare fund in which they understated the number of eligible employees and the contributions due for them, and included two employees who were not eligible for coverage (*ibid.*).

The court of appeals affirmed the convictions (Pet. App. C1-C14). It held that 18 U.S.C. 1027 broadly prohibits anyone from making a false statement in a report required to be kept by a pension fund, and that this prohibition applied to petitioners (Pet. App. C5-C7). In addition, the court found no indication in the legislative history that Congress meant to limit the proscription in the statute to fiduciaries of such plans (*id.* at C8). Instead, the statute was designed, in part, to protect participants in the plans by requiring correct reports (*ibid.*).

2. Petitioners contend (Pet. 6-15) that, as employers of persons eligible for union pension and welfare benefit fund coverage, they should not be criminally liable under 18 U.S.C. 1027 for making false reports to those funds. The court of appeals, however, properly construed the plain language of the statute to cover petitioners' conduct. Moreover, since no other court of appeals has decided this question, review by this Court is unwarranted.²

²The Eighth Circuit has observed in dictum that criminal sanctions are available under 18 U.S.C. 1027 against employers who fail to provide accurate information to the administrator of an employee pension or welfare benefit plan. *Central States, Southeast & Southwest Areas Pension Fund v. CRST, Inc.*, 641 F.2d 616, 619 n.1 (8th Cir. 1981).

Petitioners do not deny that they submitted false reports to the pension and welfare funds. Nor do they question that they could be civilly liable for their conduct (Pet. 7-8). Instead, they argue that Section 1027 does not reach their conduct because it "does not speak to any obligation of an employer" (Pet. 8). But, as the court of appeals reasoned (Pet. App. C5), the statute by its terms reaches employers as well as fiduciaries. Section 1027 provides that "whoever" makes a false statement in a document required to be kept by an employee benefit plan violates Section 1027 and is criminally liable. The decision below is fully consistent with the teaching of this Court that it is "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975). While it may be true, as petitioners contend (Pet. 12), that fiduciaries have the opportunity to do the greatest injury to pension funds, it is nevertheless the case that employers who knowingly misrepresent employee eligibility can seriously harm fund participants and undermine the fund. By using the all-encompassing term "whoever," Congress certainly would appear to have intended to proscribe conduct such as that of petitioners.

Contrary to petitioners' assertion (Pet. 10-11), the court of appeals also properly concluded that the EBCC forms and welfare fund employee reports were "required to be kept" under provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), making the records subject to Section 1027. As the court of appeals noted, the forms must be retained under 29 U.S.C. 1023(a)(2)(A) and 1024(a) because they form the basis of information submitted in annual reports to the Secretary of Labor under

ERISA (Pet. App. C5-C6). See also Section 107 of ERISA, 29 U.S.C. 1027; 29 C.F.R. 486.3(c). Accordingly, the court of appeals correctly held that knowing misstatements in those reports are proscribed by Section 1027.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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